No. 17-1201

In the Supreme Court of the United States

GARY THACKER AND VENITA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Tennessee Valley Authority (TVA), a wholly owned agency and instrumentality of the United States, may under certain circumstances invoke immunity for its performance of discretionary functions, including emergency response and the TVA's statutory authority to construct and repair electric power-transmission infrastructure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 868 F.3d 979. The order of the district court is reported at 188 F. Supp. 3d 1243 (Pet. App. 12a-16a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on August 22, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 26, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, large parts of the predominantly rural Tennessee Valley region were experiencing dire economic and living conditions, even by depression-era standards. See Tennessee Valley Authority, *A History*

of the Tennessee Valley Authority 9 (1983) (*TVA History*).[1] Annual per capita income in the region was only 45% of the national average, soil erosion from outdated farming practices had damaged millions of acres of farmland, poor logging practices had nearly ruined vast forests, flooding of the Tennessee River was uncontrolled and commercial navigation was difficult, and electricity was virtually nonexistent in the region's vast rural areas. See *id.* at 5, 9, 12, 15, 45. More than half of the region's residents lived on farms, and only three farms in every 100 had electricity, because private power companies considered service to rural farmsteads to be uneconomic. *Id.* at 9, 12. Against that background, in the first 100 days of President Franklin Roosevelt's first term, Congress enacted the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831 *et seq.*

The TVA Act created the Tennessee Valley Authority (TVA), which is "an agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), and a "wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978). President Roosevelt envisioned that TVA would "be charged with the broadest duty of planning for the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and its adjoining territory for the general social and economic welfare of the nation." H.R. Doc. No. 15, 73d Cong., 1st Sess. 1 (1933) (H.R. Doc. 15). The broad responsibilities of TVA "relate to navigability, flood control, reforestation, [the proper use of] marginal lands, and agricultural and

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[1] Https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Our%20History/A%20History%20of%20The%20Tennessee%20Valley%20Authority.pdf.

industrial development of the whole Tennessee Valley." *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946); see 16 U.S.C. 831, 831n-4(h), 831dd.

Over the years, the focus of TVA's activities has varied as a result of external events and the completion of major capital projects. In the early decades of TVA, the agency administered reforestation and fertilizer programs, and a major focus was on building dams to control flooding and improve navigation on the Tennessee River. *TVA History* 10, 15-17. During World War II, emergency dam and power plant construction supported power generation needed for war production of aluminum. *Id.* at 19, 21. For several decades following the war, TVA constructed new power plants to facilitate increased domestic use of electricity and Cold War uranium enrichment. *Id.* at 25, 28, 37, 45.

In the past decade, TVA's development activities have focused on the operation and maintenance of the power system and the Tennessee River system. The TVA Act authorized TVA to produce and sell electric power at rates as low as feasible. 16 U.S.C. 831d(*l*); 831j; 831n-4(f). TVA's power generating facilities include 29 conventional hydroelectric sites, one pumped-storage hydroelectric site, eight coal-fired sites, three nuclear sites, 16 natural gas or oil-fired sites, and one diesel generator site. See TVA, *FY 2019 Budget Proposal & Management Agenda and FY 2017 Performance Report* 3-5 (Feb. 12, 2018) (*2017 Performance Report*).[2] TVA sells wholesale electricity to municipalities and other local governmental entities and cooperatives that operate local public power electric systems,

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[2] Http://www.tva.gov/cj. The 2017 Performance Report was submitted to the Office of Management and Budget and to Congress pursuant to 31 U.S.C. 1116.

and it sells power directly to a limited number of end-use customers. *Ibid.*

To operate the power system, Congress authorized TVA to, *inter alia*, "construct * * * transmission lines * * * in the Tennessee River and its tributaries." 16 U.S.C. 831c(j). As part of that authority, TVA may "exercise the right of eminent domain" and "condemn all property that it deems necessary" for its purposes. 16 U.S.C. 831c(i). Title to all real property deemed necessary to accomplish the purposes of the Act is held in the name of the United States and the property is "entrusted to [TVA] as the agent of the United States to accomplish the purposes of [the TVA Act]." 16 U.S.C. 831c(h). The TVA's power generation activities are an essential part of the Nation's electric power supply. See Pet. 7 n.3. As of 2015, TVA supplied power to more than nine million people in seven States. See *ibid.*

As for the Tennessee River system, TVA operates a series of 49 dams as an integrated system on the Tennessee River and its tributaries to reduce the risk of flooding, facilitate navigation, produce hydroelectric power, improve water quality and supply, and provide recreational opportunities. *2017 Performance Report* 5. As noted above (see p. 3, *supra*), TVA has constructed hydroelectric power plants at many of its dams on the Tennessee River, thereby enabling the dams to "generat[e] * * * electric energy" in addition to "regulat[ing] the stream flow * * * for the purposes of promoting navigation and controlling floods." 16 U.S.C. 831h-1.

TVA is currently self-funded, financing its activities almost entirely from power revenues and power system financing. See 16 U.S.C. 831n-4(h) (authorizing TVA to

issue power bonds for financing). The agency is governed by a board of nine members appointed by the President with the advice and consent of the Senate. 16 U.S.C. 831a(a)(1). The board "may designate employees of the corporation to act as law enforcement agents" on government land and facilities entrusted to TVA, in accordance with guidelines approved by the Attorney General. 16 U.S.C. 831c-3(a), (c), and (h). Of central relevance to this case, Congress provided in the organic act that TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. 831c(b). In the words of President Roosevelt, an overarching purpose of the TVA Act was to create an entity "clothed with the power of government but possessed of the flexibility and initiative of a private enterprise." H.R. Doc. 15, at 1.

2. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The FTCA waives the United States' sovereign immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). In Section 2680, Congress carved out several exceptions to that waiver of immunity. Under one such exception, known as the discretionary function exception, the waiver of sovereign immunity in the FTCA "shall not apply" to any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a). The United States thus has maintained its immunity from

tort claims that arise in the performance of a government employee's discretionary functions.

When Congress enacted the FTCA in 1946, many federal agencies were already subject to general sue-and-be-sued clauses in their organic statutes. *Loeffler* v. *Frank*, 486 U.S. 549, 562 (1988). In the FTCA, Congress generally placed those "suable" agencies "upon precisely the same footing as torts of 'nonsuable' agencies.'" *Ibid.* (quoting H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945)). It did so by enacting Section 2679(a), which provides that "the authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U.S.C. 2679(a); see *Loeffler*, 486 U.S. at 562.

Congress exempted some federal agencies from the FTCA altogether. As relevant here, Section 2680 provides that the jurisdictional and liability provisions of the FTCA shall not apply to "[a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. 2680(*l*). The waiver of TVA's immunity from tort claims is thus governed by the sue-and-be-sued clause in its organic act, 16 U.S.C. 831c(b). Congress has further exempted from the FTCA "any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States." 28 U.S.C. 2680(d).

3. On July 30, 2013, TVA was replacing an overhead conductor on a transmission line that spanned Wheeler Reservoir—a body of water created by the Wheeler Dam—on the Tennessee River. Compl. ¶ 8. At approximately 2:40 p.m., a pulling cable failed, releasing the

tension on the line and allowing it to fall into the water between the towers. Compl. ¶ 10.

At 3:10 p.m., TVA informed the U.S. Coast Guard of the situation, and the Coast Guard established a Marine Safety Zone prohibiting all vessels from entering the Tennessee River between miles 297 and 298. C.A. App. 48, ¶ 5 (Carman Declaration). At 3:40 p.m., the Coast Guard broadcast notice of the Marine Safety Zone and the closure of the River on marine radio. *Ibid.* The Coast Guard reissued the Notice hourly thereafter in accordance with the regular schedule for such notices. *Ibid.* Entry into the area without Coast Guard authorization was a violation of federal law. See 33 C.F.R. 165.20, 165.23.

At 5:30 p.m., Petitioner Gary Thacker and a passenger began traveling downstream from Ingalls Harbor, approximately five miles upriver from the downed conductor. Compl. ¶ 16. Thacker's boat traveled at high speed, reaching the downed conductor in about five minutes. Compl. ¶ 17.

TVA had two patrol boats at the site of the downed conductor. Compl. ¶ 15. Wheeler Reservoir is over one mile wide at that location. Compl. ¶ 14. As a result of the speed of Thacker's boat and the patrol patterns of the patrol boats, neither patrol boat was able to stop Thacker's boat from reaching the downed line. Compl. ¶ 12; C.A. App. 48-49, ¶¶ 6-7. At the time, TVA employees and contractors were in the process of pulling the conductor out of the water, and the line was still low over the surface of the water. Compl. ¶ 18. Thacker's boat struck the line, "[i]nstead of being able to pass safely over it." *Ibid.* His passenger was killed and Thacker suffered physical injuries. *Ibid.*

4. Thacker and his wife (petitioners) filed suit against TVA under common-law theories of negligence and wantonness. Compl. ¶¶ 24-31. The complaint alleged that "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities," and that it "should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." Compl. ¶ 6. The complaint further alleged that TVA had breached a "duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created," and "to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." Compl. ¶ 25.

The district court granted TVA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), holding that TVA is immune from petitioners' suit. Pet. App. 12a-16a.[3] The court noted that while the TVA Act authorizes TVA to "sue and be sued in its corporate name," 16 U.S.C. 831c(b), thereby generally waiving sovereign immunity to tort suits, that liability is "subject to certain exceptions," Pet. App. 14a (quoting *United States* v. *Smith*, 499 U.S. 160, 169 (1991)). One exception recognized by the Eleventh Circuit is immunity for TVA from claims based on its performance of certain governmental, discretionary functions. See *id.* at 13a-14a. Applying this Court's two-part test for applying the discretionary function exception in the FTCA, see *United States* v. *Gaubert*, 499 U.S. 315, 322-325

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[3] The Eleventh Circuit has held that the application of immunity results in a dismissal for lack of subject matter jurisdiction. See, *e.g.*, *United States Aviation Underwriters, Inc.* v. *United States*, 562 F.3d 1297, 1299 (per curiam), cert. denied, 558 U.S. 1024 (2009).

(1991), the district court held that TVA is immune from this action because the conduct challenged here—including the TVA's safety decisions in response to a water-hazard emergency—(1) did not violate a mandatory statute, regulation, or policy that allowed for no judgment or choice; and (2) was the kind of conduct protected by the discretionary function exception. Pet. App. 14a-15a (citing *Gaubert*, 449 U.S. at 322-323). The court stated that it is "axiomatic 'that safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Ibid.* (quoting *Johns* v. *Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988)). Because the court found the alleged TVA conduct to be "the type that the discretionary function exception was designed to protect," it granted TVA's motion to dismiss. *Id.* at 15a-16a.

5. The court of appeals affirmed. Pet. App. 1a-9a. The court recognized this Court's decisions in *Loeffler*, 486 U.S. at 554, and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), stating that "'sue-and-be-sued' waivers are liberally construed." Pet. App. 4a (citation omitted). But it also noted this Court's statement in *Smith* that courts have interpreted this language to mean that TVA is "liable to suit in tort, subject to certain exceptions," *ibid.* (quoting *Smith*, 499 U.S. at 168-169). The court of appeals also noted its own precedent—cited by this Court in *Smith*, 499 U.S. at 169—that TVA is immune "when engaged in governmental functions that are discretionary in nature." *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 685 (11th Cir. 1987)). The court of appeals concluded that, here, "TVA's challenged actions occurred in the context of its performance of a governmental function." *Ibid.*

The court of appeals explained that TVA may exercise the power of eminent domain when it constructs power-transmission lines. Pet. App. 4a-5a (citing 16 U.S.C. 831c(h) and (i)). Because the power of eminent domain "belongs solely to the United States, not to commercial entities," TVA "acts as an agency of the United States" when it constructs transmission lines. *Id.* at 5a. The court thus held that TVA was entitled to assert discretionary function immunity against petitioners' allegation that the TVA had "failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River." *Ibid.* The court further held that petitioners' allegations that TVA had "failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards [TVA] created" concerned activities that were also "incident to TVA's construction of power-transmission lines," and thus within the TVA's governmental functions. *Ibid.*

Applying the two-step *Gaubert* analysis, the court of appeals held that the alleged conduct in this case fell within TVA's immunity for discretionary actions. Pet. App. 6a-8a. At the first step of the analysis, a court considers whether an employee's discretion has been cabined by a specific, mandatory directive. *Gaubert*, 499 U.S. at 322. The court concluded that petitioners had "point[ed] to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public." Pet. App. 7a. At the second step, a court considers whether the conduct at issue is "grounded in social, economic, and political policy" and thus is within the purpose of immunity for discretionary functions. *Gaubert*, 499 U.S. at 323.

The court concluded that the conduct at issue satisfies that standard because "[t]he challenged actions and decisions in this case could require TVA to consider, among other things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact." Pet. App. 7a.

6. Petitioners sought review by this Court on two questions: (i) whether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary function exception, and (ii) whether the court of appeals properly applied the discretionary function exception on the facts of this case. Pet. i. This Court granted the petition for a writ of certiorari limited to the first question presented in the petition. 9/28/18 Order.

SUMMARY OF ARGUMENT

The court of appeals correctly held that TVA may assert immunity from tort claims based on the agency's exercise of discretionary functions.

A. The TVA Act provides that TVA may "sue and be sued in its corporate name." 16 U.S.C. 831c(b). This Court has long recognized that such provisions do not waive sovereign immunity in certain circumstances. In *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), the Court explained that a sue-and-be-sued clause may be subject to an implied limitation if it can be shown, *inter alia*, that certain types of suits are not consistent with the constitutional or statutory scheme, or that an implied restriction is necessary to avoid grave interference with the performance of a governmental function. *Id.* at 245.

B. Applying the first basis identified in *Burr*, the TVA Act's sue-and-be-sued clause does not waive sovereign immunity for tort claims arising from TVA's exercise of its discretionary functions.

1. Immunity for discretionary functions is a crucial and longstanding form of protection for the government from judicial intrusion into the exercise of discretionary functions. The roots of that protection trace at least to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and it is grounded in separation-of-powers principles and the need to protect the ability of government personnel to exercise judgment and discretion. The sovereign immunity from claims based on discretionary functions thus serves to prevent judicial second-guessing of government decisions that are grounded in social, economic, or political policy through individual tort actions. The common law similarly barred suits for damages against federal employees arising out of actions that involved their exercise of discretionary judgment. When Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. 2679), it expanded the immunity of federal employees even beyond their performance of discretionary functions to cover all common-law tort suits for actions taken within the scope of their employment, and Congress instead provided for the substitution of the United States as the defendant under the FTCA, which already contained a discretionary function exception.

When Congress enacted the FTCA, it codified immunity for discretionary functions through an express exception. But the FTCA's legislative history, which this Court reviewed in depth in *Dalehite* v. *United*

States, 346 U.S. 15 (1953), indicates that Congress understood that the government would not be liable for torts committed in the exercise of discretionary functions, even without an explicit statutory exception to the FTCA's waiver of sovereign immunity. The FTCA's discretionary function exception was drafted as a clarifying amendment, to ensure that the FTCA's waiver of immunity would not be so construed.

In other areas, this Court has adopted limiting constructions of statutes to preserve traditional immunities and protections of the federal government absent an express congressional command to the contrary. Along those lines, a number of courts have concluded that a waiver of the government's immunity from tort suits challenging the performance of discretionary functions likewise requires a clear statutory expression.

2. In the same provision that exempts claims arising from activities of the TVA from the FTCA's coverage, Congress also provided that the FTCA shall not apply to claims brought under the Suits in Admiralty Act (SIAA), 46 U.S.C. 30901 *et seq.* See 28 U.S.C. 2680(d). Although the SIAA's immunity waiver provision does not contain a discretionary function exception, every court of appeals to have considered the question has recognized that the waiver does not extend to suits based on the exercise of discretionary functions.

3. The same separation-of-powers principles apply equally to tort claims brought against TVA, which is an Executive Branch agency. TVA's control of the water level in a reservoir, for example, may require the exercise of policy judgment to balance competing interests. And judgments about the best way to warn boaters of an emergency may also require balancing of infor-

mation about the efficacy of different forms of communication and the resources available. Indeed, before and shortly after the FTCA was enacted, federal district courts determined that TVA could not be sued for actions taken for flood control purposes or alterations of the river because of discretionary function immunity. If any aggrieved person could challenge those decisions through a tort action for damages, judges would be in the position of second-guessing the agency's policy decisions.

C. Construing TVA's sue-and-be-sued clause not to extend the waiver of sovereign immunity to suits based on discretionary functions is also appropriate under *Burr*'s second justification because it is necessary to avoid grave interference with the performance of government functions that Congress has assigned to TVA. Petitioners contend that the TVA activities at issue in this case—constructing and maintaining electric power infrastructure, as well as emergency response—are not governmental activities. That contention is mistaken. TVA is specifically authorized to produce and sell electric power to promote the general welfare of the region, and it has been given eminent domain power on behalf of the United States to accomplish those duties. More generally, this Court's precedent does not support petitioner's effort to parse the TVA's activities and treat as commercial or non-governmental any activity also performed by private entities.

D. Petitioners contend that TVA is attempting to engraft the FTCA's discretionary function exception onto the TVA Act's sue-and-be-sued clause. That is incorrect. TVA's argument is instead that the Court should decline to read the sue-and-be-sued clause as abrogating TVA's immunity from suits arising from the

performance of discretionary functions, based on separation-of-powers principles that predate the FTCA and the need to protect the ability of the government to exercise judgment and discretion. Petitioners further contend that construing the TVA Act's sue-and-be-sued clause not to waive sovereign immunity for discretionary functions would itself offend the separation of powers because it would contravene Congress's power to dictate waivers of sovereign immunity. But the question here is whether Congress intended to subject TVA to tort claims for the activities of its employees engaged in discretionary functions by including a general sue-and-be-sued clause in the agency's organic statute. The history of the discretionary function exception, the TVA Act, and the FTCA all support the conclusion that Congress would have expected TVA to be immune from such claims.

ARGUMENT

THE GENERAL WAIVER OF IMMUNITY FROM SUIT IN THE TVA ACT'S SUE-AND-BE-SUED CLAUSE DOES NOT EXTEND TO CLAIMS BASED ON TVA'S PERFORMANCE OF DISCRETIONARY FUNCTIONS

Because "claims arising from activities of the Tennessee Valley Authority" are excluded from the waiver of sovereign immunity in the FTCA, 28 U.S.C. 2680(*l*), the discretionary function exception contained to that immunity in the FTCA does not govern petitioners' suit. The court of appeals, however, correctly recognized that TVA nevertheless is immune from tort claims that arise from the agency's exercise of its discretionary functions. This Court has recognized that Congress's waiver of an agency's immunity through a general sue-and-be-sued clause, such as the one contained in the TVA Act, 16 U.S.C. 831c(b), may be subject to implied

limitations. The TVA Act's sue-and-be-sued clause, properly interpreted, does not abrogate the longstanding immunity from suit based on claims arising out of the performance of discretionary functions. There is no indication that Congress intended to subject TVA to liability for the performance of discretionary functions. And the preservation of immunity from such claims is necessary to protect separation-of-powers principles reflected in the constitutional and statutory schemes and to prevent interference with TVA's governmental functions.

A. Sue-And-Be-Sued Clauses Embody Limitations On The Waiver Of Sovereign Immunity Applicable In Appropriate Circumstances

The TVA Act provides that TVA may "sue and be sued in its corporate name." 16 U.S.C. 831c(b). As this Court has explained, "[c]ourts have read" that provision to "mak[e] the TVA liable to suit in tort, *subject to certain exceptions.*" *United States* v. *Smith*, 499 U.S. 160, 168-169 (1991) (emphasis added). In support of that observation, *ibid.*, the Court cited *Peoples National Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987), and *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983), both of which held that TVA's sue-and-be-sued clause does not waive immunity from tort suits arising from the agency's exercise of discretionary functions. See *People's Nat'l Bank*, 812 F.2d at 684-685 (finding TVA immune from tort claim arising from agency's development and administration of a loan program); *Queen*, 689 F.2d at 84-85 (finding TVA immune from tort claim arising from agency's actions pursuant to a statutory mandate directing TVA to conduct studies and experiments to promote the wider and better use of electric power). Subsequent decisions from

those circuits adhere to the holding that TVA may invoke discretionary function immunity. See *Bobo* v. *TVA*, 855 F.3d 1294, 1309 (11th Cir. 2017) (acknowledging that TVA's waiver of sovereign immunity is subject to an exception for discretionary functions, but finding that it did not apply in a tort action arising from exposure to asbestos fiber from a TVA nuclear power plant); *Edwards* v. *TVA*, 255 F.3d 318, 320 (6th Cir. 2001) (finding TVA immune from tort claim where fisherman fell from rocky shoreline near a TVA dam).

The court of appeals' conclusion (Pet. App. 4a) that TVA is immune from tort actions based on the performance of discretionary functions is consistent with this Court's decisions addressing sue-and-be-sued clauses. This Court has long recognized that such waivers must "be construed with reference to the powers conferred by the provisions to which they relate" and are subject to implied limitations in appropriate circumstances. *People of Porto Rico* v. *Rosaly y Castillo*, 227 U.S. 270, 277 (1913). In *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), the Court stated that although a waiver of immunity from suit through a general sue-and-be-sued clause should be "liberally construed," implied limitations to the waiver may be warranted in certain circumstances. *Id.* at 245.

The question in *Burr* was whether the Federal Housing Administration (FHA), created in 1934, see Act of June 27, 1934, ch. 847, Tit. I, § 1, 48 Stat. 1246, was subject to garnishment for money due to an employee. *Burr*, 309 U.S. at 243. In creating the FHA, Congress had provided that the Administrator was authorized "to sue and be sued in any court of competent jurisdiction, State or Federal." *Id.* at 244 (quoting Act of Aug. 23, 1935, ch. 614, § 344(a), 49 Stat. 722). FHA asserted that

it was "an agency of the United States Government and * * * , therefore, not subject to garnishee proceedings." *Ibid.*

The Court observed in *Burr* that "when Congress establishes * * * an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." 309 U.S. 245. But the Court further explained that a sue-and-be-sued clause may be subject to implied limitations if it can be shown "[1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Ibid.* (footnote omitted); see *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988); see also *FDIC* v. *Meyer*, 510 U.S. 471, 481 (1994).

As an example of the first category, the Court cited *People of Porto Rico*, which held that an organic act provision giving Puerto Rico's government the power "to sue and be sued" did not waive Puerto Rico's sovereign immunity. 227 U.S. at 277. The Court in *People of Porto Rico* explained that a sue-and-be-sued clause must "be construed with reference to the powers conferred by the provisions to which they relate," and it determined that Congress could not have "intended by the [sue-and-be-sued] clause * * * to destroy the government which it was its purpose to create." *Ibid.* The Court held that, notwithstanding the sue-and-be-sued clause, Puerto Rico remained immune from suit without its consent. *Ibid.* Thus, when consent to "sue and be sued" is given

by Congress, it is necessary for a court to determine whether the type of suit before it "comes within the scope of that authorization." *Burr*, 309 U.S. at 244; see *Meyer*, 510 U.S. at 482 (citing *Burr*, 309 U.S. at 244). As explained below, a tort suit based on TVA's performance of a discretionary function, a type of suit from which virtually every other federal agency would be immune, does not "come within the scope of th[e] authorization" by Congress, *Burr*, 309 U.S. at 244, in the TVA Act's sue-and-be-sued clause.

B. The TVA Act's Sue-And-Be-Sued Clause, Read In Light Of Separation-Of-Powers Principles, Does Not Waive Sovereign Immunity From Suits Based On The Performance Of Discretionary Functions

This suit falls squarely within the first category of cases in which the Court in *Burr* stated that a general sue-and-be-sued clause does not waive sovereign immunity. Tort suits based on TVA's exercise of discretionary functions "are not consistent with the statutory or constitutional scheme." 309 U.S. at 245. Allowance of such suits would conflict with the separation-of-powers principles that underlie the immunity from suit based on the performance of discretionary functions. Such suits would also be inconsistent with the statutory scheme. *Ibid.* As explained more fully at pp. 36-40, *infra* (discussing *Burr*'s second category), Congress has assigned broad and important duties to TVA, from controlling floods on the Tennessee River to providing electricity to the Tennessee Valley. It is difficult to imagine that Congress intended to abrogate sovereign immunity for discretionary functions, and subject TVA to individual tort suits for injuries caused by discretionary decisions of TVA employees, in carrying out such responsibilities.

1. The longstanding immunity from suit based on the performance of discretionary functions is grounded in separation-of-powers principles

The TVA Act's sue-and-be-sued clause does not contain an express discretionary function exception. And because TVA is exempt from the FTCA, 28 U.S.C. 2680(*l*), the statutory exception in the FTCA also does not apply. The doctrine of immunity from judicial intrusion into the performance of discretionary functions, however, is a longstanding one that predates the FTCA and is grounded in separation-of-powers principles. Congress's general authorization for TVA to "sue and be sued"—which does not specifically refer to tort suits for damages or particular grounds for immunity—does not contain the requisite manifestation of an intention to abrogate the government's immunity from such suits.

a. The immunity for discretionary functions is a crucial and longstanding form of immunity that protects the government from "liability for errors * * * in the exercise of discretionary functions." *Dalehite* v. *United States*, 346 U.S. 15, 26-27 (1953). Its foundation is "a concept of substantial historical ancestry in American law." *Id.* at 34. That history in the United States, this Court noted in *Dalehite*, *id.* at 34 n.30, dates at least to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall stated that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Id.* at 170. "Where the head of a department acts in a case, in which executive discretion is to be exercised," Chief Justice Marshall explained, "it is again repeated, that any application to a court to control, in any respect,

his conduct, would be rejected without hesitation." *Id.* at 170-171.

In the centuries since, this Court has repeatedly affirmed the importance of protecting discretionary functions from judicial oversight. See *Dalehite*, 346 U.S. at 34 & n.30. In 1845, for example, the Court stated that "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake." *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845). The Court added that "[w]e are not aware of any case in England or in this country" to the contrary. *Id.* at 97; see also *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) (citing cases from the 19th and early 20th centuries "in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted").

The decisions recognizing immunity of the government from liability for errors in the exercise of discretionary functions are grounded in separation-of-powers principles. See, *e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). Under those principles, challenges to the discretionary determinations of government officials are not appropriately addressed in a court of law through an individual action in tort. Indeed, this Court has explained that the purpose of immunity from damages actions based on such functions is to "prevent judicial 'second-guessing' of legislative

and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). "A contrary principle would indeed be pregnant with the greatest mischiefs." *Kendall*, 44 U.S. (3 How.) at 98.

b. It is also significant that the common law similarly protected federal officers in suits for damages arising out of actions that involved the exercise of discretionary judgment. See *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) ("In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."). Thus aside from some government officials like prosecutors, judges, and legislators, who enjoy absolute immunity from suit for performing their assigned functions, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982), government officers have traditionally been protected by a qualified immunity from suit. With regard to state-law tort actions, this Court held that federal employees are immune from suits arising out of actions that involved the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988).

The Court reasoned in *Westfall* that the limitation of official immunity to actions arising out of an employee's discretionary actions reflected a balance between the benefits and costs of insulating government employees from suit. Official immunity is intended not "to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation."

484 U.S. at 295. In particular, official immunity seeks to counter the possibility that "the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." *Ibid.*; see *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the Court explained, "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" *Westfall*, 484 U.S. at 297 (quoting *Barr* v. *Matteo*, 360 U.S. 564, 571 (1959) (opinion of Harlan, J.)).

Subsequently, in the Westfall Act, enacted in response to this Court's decision in *Westfall*, Congress expanded the immunity of federal employees beyond their performance of discretionary functions to cover all common-law tort suits for actions taken within the scope of the their employment. See 28 U.S.C. 2679. Congress instead provided for the substitution of the United States as the defendant under the FTCA, which, as recounted below, already contained an express discretionary function exception. 28 U.S.C. 2679(b)(1). When it enacted the Westfall Act, Congress also amended the TVA Act to provide a corresponding immunity for TVA employees, with the substitution of TVA as the defendant instead of the United States. 16 U.S.C. 831c-2.[4]

c. The scope of review of governmental action in suits for declaratory or injunctive relief has broadened since *Marbury* and *Kendall* under the Administrative

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[4] Before the Court's decision in *Westfall*, the Eleventh Circuit had held that TVA employees were protected by official immunity for their exercise of discretionary functions. See, *e.g.*, *Johns* v. *Pettibone*, 769 F.2d 724, 727-728 (1985).

Procedure Act, 5 U.S.C. 701 *et seq.*, especially as a result of the elimination of sovereign immunity in such suits in 1976. See Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721; 5 U.S.C. 702. But in the FTCA, enacted close in time to the enactment of the APA in 1946, Congress preserved immunity from damages actions in tort based on the performance of discretionary functions. Thus, in 1946, when Congress waived the government's sovereign immunity from suit for certain torts, see p. 5, *supra*, it codified the immunity for discretionary functions by barring "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

By enacting the discretionary function exception in the FTCA, Congress did not purport to alter its scope. And the FTCA's legislative history, on which this Court relied in *Dalehite*, indicates that Congress understood that the government would not have been subject to suit based on the exercise of discretionary functions even without an explicit statutory command. In *Dalehite*, a case that involved the explosion of ships carrying fertilizer that had been produced under the control of the United States, 346 U.S. at 18, this Court reviewed the historical background and legislative history specifically with respect to the discretionary function exception at length, *id.* at 24-30. The Court explained that the exception "was drafted as a clarifying amendment * * * to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions." *Id.* at 26-27.

The Court observed that "[a]n Assistant Attorney General, appearing before the Committee * * * [,] explained [the discretionary function exception] as avoiding 'any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity,' merely because 'the same conduct by a private individual would be tortious.'" *Dalehite*, 346 U.S. at 27 (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (House Hearings). It was not "intended," Assistant Attorney General Shea explained, "that the * * * propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort." *Ibid.* (citation omitted).

Referring to a prior bill that did not incorporate a discretionary function exception, the House Committee on the Judiciary was advised that "the cases embraced within [the new] subsection would have been exempted from [the prior bill] by judicial construction." *Dalehite*, 346 U.S. at 27 (quoting House Hearings 35) (brackets in original). "It is not probable," the committee was informed, "that the courts would extend a Tort Claims Act into the realm of the validity of * * * discretionary administrative action, but [the statutory exception] makes this specific." *Ibid.* (citation omitted).

In *Varig Airlines*, the Court reiterated that when Congress enacted the FTCA, it "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction," but the exception was nevertheless "added to make clear that the [FTCA] was not to be extended into the realm of the validity of * * * discretionary administrative action."

467 U.S. at 810. In other words, the discretionary function exception "merely makes explicit what would otherwise be implicit." *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990) (citing *Varig Airlines*, 467 U.S. at 810), cert. denied, 500 U.S. 941 (1991); see *Gray* v. *Bell*, 712 F.2d 490, 509 (D.C. Cir. 1983) (FTCA's legislative history "reflects a congressional belief that courts would continue to apply preexisting common law doctrine barring claims against discretionary government acts"), cert. denied, 465 U.S. 1100 (1984). Shortly after the FTCA was enacted, the Eighth Circuit observed that Congress had adopted the discretionary function exception "in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment." *Coates*, 181 F.2d at 818.

This Court's extensive review of the historical underpinnings of the FTCA's discretionary function exception establishes that its roots, grounded in the separation of powers and the need for protection of the exercise of judgment and discretion, long preexisted the FTCA. It was expected that this longstanding doctrine would not have been abrogated by the FTCA's general waiver of sovereign immunity for damages actions in tort against the government even without an express exception, but to remove any doubt, that doctrine (and its underlying principles) were codified in the FTCA's discretionary function exception. For the same reasons, it would have been expected that the general sue-and-be-sued clause in the TVA Act would be construed not

to waive sovereign immunity from damages actions for tort claims based on the performance of discretionary functions.

d. In other areas, this Court has adopted limiting constructions to preserve traditional immunities and protections of the federal government. In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), this Court held that a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, making the United States' liability "the same as a private person" did not waive the government's sovereign immunity from interest payments, despite the statute's silence on the issue. 478 U.S. at 319-320. The Court noted that "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically." *Ibid.* Similarly, in *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that the broad waiver of sovereign immunity in the FTCA did not apply to claims by military personnel for service-related injuries. *Id.* at 146. This Court concluded that it could not "impute to Congress such a radical departure from established law in the absence of express congressional command." *Ibid.* And in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), the Court held that in amending the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, so as to bring the federal government within its scope, Congress did not grant a right to a jury trial to federal employees suing the government under that Act. 453 U.S. at 168-169. The Court required a "clear[] and unequivocal[]" statement before it would decide that Congress intended to abrogate the long settled rule that the Seventh Amendment right to a jury trial does

not apply in actions against the federal government. *Id.* at 162.

Similarly, a number of courts of appeals construing the SIAA have concluded that a waiver of the government's established immunity from tort suits based on the performance of discretionary functions "requires clear statutory expression." *Wiggins* v. *United States*, 799 F.2d 962, 965 (5th Cir. 1986); see *Sea-Land Serv.*, 919 F.2d at 891 ("Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions."); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976) (declining, "in the absence of an express Congressional directive to the contrary," to construe the waiver of sovereign immunity set forth in the SIAA as providing federal courts with the power to review governmental policy decisions), cert. denied, 430 U.S. 954 (1977).

2. Courts have uniformly held, based on separation-of-powers principles, that the waiver of sovereign immunity contained in the SIAA does not extend to actions based on discretionary functions

In the same FTCA provision that exempts claims arising from activities of TVA from the FTCA's coverage, 28 U.S.C. 2680(*l*), Congress also provided that the FTCA "shall not apply" to "[a]ny claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States," 28 U.S.C. 2680(d). Instead, the United States has waived its immunity from claims covered by that Act—the Suits in Admiralty Act (SIAA)—through a provision that permits "a civil action in admiralty in personam" against the United States or a federally owned corporation in circumstances where a civil action in ad-

miralty could be maintained if a private person or property had been involved. 46 U.S.C. 30903(a). Although the SIAA's immunity waiver provision does not contain a discretionary function exception, every court of appeals to have considered the question has held that the waiver does not extend to suits based on the performance of such functions.[5]

Courts construing the SIAA have "understood *Varig* [*Airlines*] to teach that, as a matter of judicial construction, [courts] should not read a general waiver of sovereign immunity to include a waiver of immunity with respect to damage occasioned by policy decisions." *Sea-Land Serv.*, 919 F.2d at 891; see *McMellon* v. *United States*, 387 F.3d 329, 341 (4th Cir. 2004) (en banc) (Court's explanation of the FTCA exception in *Varig* "makes it clear that the exception is a statutory embodiment of separation-of-powers concerns."), cert. denied, 544 U.S. 974 (2005); *Canadian Trans. Co.* v. *United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980) ("Our recognition of a discretionary function exception

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[5] See *Gercey*, 540 F.2d at 539; *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv.*, 919 F.2d at 891 (3d Cir.); *McMellon* v. *United States*, 387 F.3d 329, 338 (4th Cir. 2004) (en banc), cert. denied, 544 U.S. 974 (2005); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Wiggins*, 799 F.2d at 966; *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985), abrogated on other grounds by *Cranford* v. *United States*, 466 F.3d 955, 959 (11th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

in the [SIAA], * * * is not an attempt to rewrite the statute, but merely an acknowledgement of the limits of judicial power."). Those courts have recognized that courts must adhere to the doctrine of separation of powers "even in the absence of an explicit statutory command." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (quoting *Canadian Trans.*, 663 F.2d at 1086).

Citing the concerns underlying the separation-of-powers rationale for the discretionary function exception, courts construing the SIAA have recognized that without reading the immunity waiver as inapplicable to discretionary functions, "all administrative and legislative decisions concerning the public interest in maritime matters" would be subjected "to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *Bearce* v. *United States*, 614 F.2d 556, 559 (7th Cir.), cert. denied, 449 U.S. 837 (1980); see *Gercey*, 540 F.2d at 539. Those courts have viewed such an outcome as "intolerable under our constitutional system of separation of powers." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d at 35; accord *Wiggins*, 799 F.2d at 966 ("Without the implication of a discretionary functions exception in the [SIAA], every decision of a government official cognizable under that Act would be subject to a second-guessing by a court on the claim that the decision was negligent."); *Canadian Transp.*, 663 F.2d at 1085 ("[R]espect for the doctrine of separation of powers requires that in cases arising under the [SIAA], courts should refrain from passing judgment on the appropriateness of actions of the executive branch

which meet the requirements of the discretionary function exception of the FTCA.").[6]

3. Tort suits against TVA for damages arising from the agency's performance of discretionary functions would raise significant separation-of-powers concerns

The same separation-of-powers concerns that undergird immunity for performance of discretionary functions at common law and under the FTCA, and that have justified its recognition under the SIAA, are fully applicable to tort claims brought against TVA. Because tort suits seeking to hold TVA liable for injuries arising from the exercise of discretionary functions are "not consistent with the statutory or constitutional scheme," *Burr*, 309 U.S. at 245, the TVA Act's general waiver of immunity should likewise be construed not to extend to claims based on TVA's performance of discretionary functions. Otherwise, TVA's discretionary decisions in all aspects of its broad operations would be subjected to review in individual tort actions decided by courts any time those policy judgments were to cause private inju-

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[6] As the government explained in its brief in opposition to the petition for a writ of certiorari, petitioners' case properly falls under the SIAA's waiver of sovereign immunity, not the waiver of immunity in the TVA Act, because petitioners' claims fall within the district court's admiralty jurisdiction. Br. in Opp. 16-19. The SIAA waives sovereign immunity to suits in admiralty against the United States "or a federally-owned corporation" where such an action could be maintained if a private person were involved. 46 U.S.C. 30903(a). Where the SIAA applies, an action under it is "exclusive of any other action * * * against * * * the United States or the federally-owned corporation." 46 U.S.C. 30904. That exclusive remedy provision governs petitioners' suit. In the event of a remand to the district court, the TVA intends to assert immunity under the SIAA.

ries. That outcome is incompatible with our constitutional system of separation of powers. See *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d at 35.

a. Separation of powers concerns apply with full force to TVA, which is an Executive Branch "agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), in addition to being "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978). TVA has a board of directors that is appointed by the President with the advice and consent of the Senate, 16 U.S.C. 831a(a)(1).[7] Congress has charged TVA with pursuing defined public purposes, 16 U.S.C. 831, and determined in some cases how TVA must prioritize those purposes, 16 U.S.C. 831h-1. TVA is vested with law enforcement authority, 16 U.S.C. 831c-3(a) and (b), and the power of eminent domain, 16 U.S.C. 831c(h); see *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946) (holding that TVA's takings of land were for a public purpose under the Takings Clause). As President Roosevelt described his vision for TVA, it was to be "possessed of the flexibility of private enterprise" but "clothed with the power of government." H.R. Doc. 15, at 1.

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[7] Petitioners quote language (Br. 9, 19) from *Pierce* v. *United States*, 314 U.S. 306, 310 (1941), stating that the TVA is "a corporate entity, separate and distinct from the Federal Government itself." That language (from a declined jury instruction) pertained to whether, at the time, a criminal prohibition on impersonating officers of the United States extended to officers of government-owned corporations. *Ibid.* Congress later expressly extended the statute to government-owned corporations, *id.* at 310-311, and in any event the question is wholly tangential to the question whether civil tort suits based on the TVA's performance of discretionary functions implicate separation-of-powers concerns.

Petitioners err in suggesting (Br. 8-9, 19-21) that the TVA's corporate status obviates the concerns underlying the immunity from suit for discretionary functions. Congress took the opposite view, applying the discretionary function exception in the FTCA to "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. 2671; see 28 U.S.C. 2680(a). Furthermore, the SIAA similarly extends to "federally-owned corporation[s]," 46 U.S.C. 30903, and as explained above, the courts of appeals have uniformly interpreted the immunity waiver in that statute not to extend to discretionary functions. Cf. *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015) (holding that Amtrak, a federally owned corporation that is engaged in activities with commercial analogues, is a governmental entity for purposes of separation of powers).

b. Moreover, TVA has "broad responsibilities" throughout the Tennessee River valley—duties relating "to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley"—that are not materially different from those of other government agencies. *Welch*, 327 U.S. at 553. For example, maintaining reservoir levels for flood control—an express part of the TVA's charge, 16 U.S.C. 831, and parallel to functions performed elsewhere by the U.S. Army Corps of Engineers (Corps)—is a quintessential discretionary function that Congress expected would be excepted from suit under the FTCA's discretionary function exception. See *Dalehite*, 346 U.S. at 29-30 (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (H.R. Rep. No. 2245)) (describing the exception as "intended to preclude any possibility that the bill might be construed to

authorize suit for damages against the Government growing out of authorized activity, such as a flood-control or irrigation project").

In *McMellon*, the Fourth Circuit observed that permitting tort liability for the government's decision to build a dam in a particular location or otherwise change the course of a navigable waterway would be "problematic, to say the least," and the court recognized an implied discretionary function exception to the SIAA's immunity waiver as a result. 387 F.3d at 342. Building dams on the Tennessee River and changing the course of the waterway so that commercial navigation could be accomplished was a key responsibility of the TVA. 16 U.S.C. 831h-1; *TVA History* 10, 15-17. Under petitioners' reading of the TVA Act's sue-and-be-sued clause, TVA could be sued in tort for its decisions to build dams in certain locations or to release water from a reservoir for flood control. That reading of TVA's sue-and-be-sued clause is untenable.

Indeed, before the FTCA was enacted, a federal district court in Tennessee had determined that TVA could not be sued for actions taken for flood control or alterations to the course of the river. *Grant* v. *TVA*, 49 F. Supp. 564, 565-566 (E.D. Tenn. 1942). The court explained that TVA's sue-and-be-sued clause "is to be taken into consideration with the congressional purposes in creating this governmental corporation." *Id.* at 565. The court determined, based on "grounds of public policy," that TVA was not suable in tort for "damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence," notwithstanding its sue-and-be-

sued clause. *Id.* at 566;[8] see also *Adams* v. *Home Owners' Loan Corp.*, 107 F.2d 139, 141 (8th Cir. 1939) (holding that Home Owners Loan Corporation was not subject to individual tort claim for malicious prosecution under sue-and-be-sued clase, citing *Spalding*, *supra*).

Another federal district court reaffirmed the *Grant* court's conclusion in *Atchley* v. *TVA*, 69 F. Supp. 952 (N.D. Ala. 1947), shortly after Congress enacted the FTCA. The court explained that Congress could not have intended that TVA decisions about releasing water from reservoirs would be made by juries in tort actions, rather than by "the skilled and experienced engineers to whom this duty has been delegated." *Id.* at 935. The court stated: "[T]he present case comes clearly within the principle that the performance by executive officers of discretionary government duties entrusted to them by statute is not subject to judicial review," and the court noted that this principle had "recently been reaffirmed by Congress in the [FTCA]." *Id.* at 935 & n.4.

c. Tort suits challenging TVA's exercise of discretionary functions would raise the same concerns about "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy" that historically undergirded protection for the exercise of judgment and discretion by government officials and that was the foundation for the preservation of immunity for discretionary functions in the FTCA. *Varig Airlines*, 467 U.S. at 814. TVA's control of the water level in a reservoir, for example, may

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[8] The court in *Grant* further stated that TVA would be suable in tort for damages arising from its activities "in the commercial field," including power generation. 49 F. Supp. at 566. That distinction between "governmental" and "commercial" activities has been undermined by this Court's cases. See pp. 39-40, *infra*.

require the exercise of policy judgment to balance potentially competing interests in navigation, recreation, and power generation. And judgments about the best way to warn boaters of an emergency in the water may require balancing of information about the efficacy of different forms of communication and the resources available.

Indeed, in many cases, TVA's actions will create benefits and burdens for different parties. If any aggrieved plaintiff could challenge those decisions through a tort action, judges would be placed in the position of second-guessing TVA's policy decisions and making judgments as to how best to balance competing societal values and interests. If the TVA Act's sue-and-be-sued clause were not read to preserve immunity for discretionary functions, "the executive branch's ability to 'faithfully execute[]' the law, U.S. Const., art. II § 3, would be substantially impaired." *McMellon*, 387 F.3d at 342 (brackets in original). As under the SIAA, "[a] failure to recognize *any* discretionary function exception would allow the deterrent effect of tort liability in those very areas where Congress has mandated an active executive role." *Id.* at 351 (Wilkinson, J., concurring). Consistent with separation-of-powers principles, the Court should read the TVA Act's general immunity waiver as not extending to suits based on TVA's performance of discretionary functions.

C. TVA's Immunity From Suit Based On Performance Of Discretionary Functions Is Necessary To Avoid Interference With Important Governmental Functions

For similar reasons, construing the TVA Act's sue-and-be-sued clause not to waive sovereign immunity for discretionary functions is appropriate under the second (and related) justification described in *Burr* because it

"is necessary to avoid grave interference with the performance of * * * governmental function[s]" that Congress has assigned to TVA. *Burr*, 309 U.S. 245.

In addition to the prevention of judicial second-guessing of executive policymaking decisions in damages actions, immunity for discretionary functions "protect[s] the Government from liability that would seriously handicap efficient government operations." *Varig Airlines*, 467 U.S. at 814 (citation omitted). "Without the implication of a discretionary functions exception," the government would constantly be subject to tort suits claiming that its policy decisions were negligent. *Wiggins*, 799 F.2d at 966. For the reasons stated above, such second-guessing would seriously interfere with TVA's ability to carry out the many duties that Congress has assigned to it.

In addressing this second category referred to in *Burr*, petitioners contend (Br. 29-31) that the TVA functions at issue in this case—constructing and maintaining electric power infrastructure, as well as emergency response—are not "governmental." That contention is mistaken. TVA is specifically authorized by Congress to produce and sell electric power at rates as low as feasible. 16 U.S.C. 831d(*l*), 831j, 831n-4(f). That mandate was critical to bring electricity to the Tennessee Valley's vast rural areas, *TVA History* 5, 9, 12, 45, and TVA's power operations "improve the economy of the area served by TVA power and promote the general welfare of the nation." *United States ex rel. TVA* v. *An Easement & Right-of-Way Over Two Tracts Of Land*, 246 F. Supp. 263, 269 (W.D. Ky. 1965), aff'd, 375 F.2d 120 (6th Cir. 1967) (per curiam). Congress specifically gave TVA the authority to "construct * * * transmis-

sion lines * * * in the Tennessee River and its tributaries, 16 U.S.C. 831c(j), and gave the agency eminent domain power to carry out these duties, 16 U.S.C. 831c(i).

Moreover, this Court recognized in *Ashwander*, *supra*, that TVA's furnishing of electric power, which here is accomplished by power transmission lines like the one that was being repaired in this case when the accident occurred, is an exercise of the government's authority under Article IV, § 3 of the Constitution to dispose of the property of the United States. 297 U.S. at 330 (observing with respect to generation of hydroelectric power that "[t]he power of falling water" is an inevitable result of the construction of a dam and the "electric energy thus produced[] constitute[s] property belonging to the United States"). Repairing the transmission line that enables the United States to dispose of its property is a means of accomplishing that constitutional objective and "raise[s] no different constitutional question." *Id.* at 339.

The construction, operation, and maintenance of electric power infrastructure is an important governmental function that is also carried out by other federal agencies. The Corps is the largest owner-operator of hydroelectric power plants in the United States and currently operates 356 hydroelectric generating units at 75 multipurpose reservoirs. U.S. Army Corps of Eng'rs, *StrongPoint* (Feb. 9, 2016);[9] see 16 U.S.C. 825s. And the Bureau of Reclamation operates 53 hydroelectric power plants and is the nation's second largest producer of hydroelectric power. Bureau of Reclamation,

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[9] Http://cdm16021.contentdm.oclc.org/utils/getfile/collection/p16021coll8/id/3498/filename/3498.pdf.

U.S. Dep't of the Interior, *Hydropower Program*.[10] Conducting patrols and emergency response on public lands and waters is also a quintessential governmental function. Petitioners allege in their complaint that TVA has significantly diminished its activities on that front in recent years, J.A. 24-25, ¶ 6, but that development does not alter the governmental nature of the activity.

More generally, this Court's precedent does not support petitioners' effort to parse the TVA's activities and treat as "commercial" or "non-governmental" any activity also performed by private entities. See, *e.g.*, Pet. Br. 30 ("[R]aising a power line is the work of an electrical contractor."). In *Dalehite*, the government conduct—the manufacture and shipping of fertilizer—could also have been carried out commercially by private entities. 346 U.S. at 19-23. This Court nonetheless found the FTCA's discretionary-function exception applicable, rejecting the dissent's argument that the discretionary function exception was inapplicable because the government was "carrying on activities indistinguishable from those performed by private persons," "akin to those of a private manufacturer, contractor, or shipper." *Id.* at 60 (Jackson, J., dissenting).

The Court has observed that "[l]egitimate activities of governments are sometimes classified as 'governmental' or 'proprietary,'" but the Court's "decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank* v. *Board of Cnty. Comm'rs*, 368 U.S. 146, 150-151 (1961)

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[10] Http://www.usbr.gov/power/who/who.html (last updated Jan. 1, 2018).

(footnote omitted). The repairs being conducted by TVA to the power transmission line in this case were specifically authorized by Congress, and TVA was therefore engaged in a governmental function.

D. Petitioners' Arguments For Reading The TVA's Sue-And-Be-Sued Clause To Abrogate Immunity For Discretionary Functions Are Without Merit

1. Petitioners contend (Br. 13-16) that TVA is attempting to "engraft" the FTCA's discretionary function exception onto the TVA Act's sue-and-be-sued clause, even though Congress specifically excluded TVA from the FTCA. Pets. Br. 14 (citation omitted). In support of that argument, petitioners analogize this case to *Meyer*, *supra*. In *Meyer*, the Court determined that the FTCA was not the exclusive remedy for *constitutional* tort claims against the FDIC because Section 1346(b), the provision of the FTCA that confers jurisdiction and waives sovereign immunity, encompasses only state-law claims. 510 U.S. at 477 (citing 28 U.S.C. 1346(b) (2012 & Supp. 2017)). Because a constitutional tort claim is not cognizable under Section 1346(b), the Court explained that the FDIC's immunity from such claims must instead be assessed under its sue-and-be-sued clause. *Id.* at 479; see 12 U.S.C. 1725(c)(4) (1988). The FDIC argued that the scope of the immunity waiver in its sue-and-be-sued clause "should be limited to cases in which [the FDIC] would be subjected to liability as a private entity," which would make the agency immune from constitutional tort claims because "the Constitution generally does not restrict the conduct of private entities." *Meyer*, 510 U.S. at 480. The Court stated that, "[i]n essence," FDIC was asking the Court "to engraft a portion of * * * [Section] 1346(b)—liability 'under circumstances where the United States, if a private

person, would be liable to the claimant,' onto the sue-and-be-sued clause." *Ibid.* The Court rejected that argument and held that the FDIC's sue-and-be-sued clause waived the agency's sovereign immunity from the plaintiff's constitutional tort claim. *Id.* at 480-483.

In contrast to the FDIC's argument in *Meyer*, TVA does not ask the Court to "engraft" any portion of the FTCA onto the TVA Act's sue-and-be-sued clause. TVA's argument is instead based on this Court's recognition, long before enactment of the FTCA, of immunity from suit for discretionary functions grounded in separation-of-powers principles. See pp. 20-28, *supra*. The issue here is whether the principles that prompted recognition of that immunity (and its codification in the FTCA) warrant reading the TVA Act to preserve that immunity, notwithstanding the absence of an express exception to that effect. Nothing in the FTCA or the TVA Act suggests that TVA was uniquely outside of Congress's expectation that discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction," even if the exception had not been codified in the FTCA. *Varig Airlines*, 467 U.S. at 810. Indeed, as described above, see pp. 34-35, *supra*, some district courts had already read TVA's immunity waiver as subject to such an exception before the FTCA was enacted.

Nor would affirming the preservation of immunity for discretionary functions make the general waiver of immunity in the TVA Act "coextensive" with the FTCA. Pets. Br. 15-16. The FTCA contains a host of other provisions not present in the TVA Act's sue-and-be-sued clause—such as restrictions on settlement authority, an administrative exhaustion requirement, a two-year statute of limitations, and prohibitions on certain causes

of action. See, *e.g.*, 28 U.S.C. 2401(b), 2672, 2674-2675, 2680. Recognizing the inclusion of TVA under the immunity of federal agencies generally from suits based on discretionary functions, grounded in separation-of-powers principles that predated the TVA Act and the FTCA, would not mean that other limitations reflected in the FTCA must also apply to TVA.

The proposal to exclude TVA from the FTCA, which had been included in previous House versions of the bill, see H.R. Rep. No. 2245, at 11-12, was presented by Senator Hill of Alabama as a floor amendment to the Senate bill that was eventually enacted into law. Petitioner relies (Br. 21) on Senator Hill's floor statement, in which he stated that TVA had "t[aken] the place of private utility companies" in some locations in the Tennessee Valley, that the TVA Act permitted people to exercise rights against TVA exactly as they would have been against private companies, and that the FTCA should not interfere with any rights in the Tennessee Valley. 92 Cong. Rec. 6563-6564 (1946). It is not clear what rights Senator Hill had in mind, but there is no reason to think that in enacting the FTCA, Congress uniquely wanted TVA to be subject to damages in tort for the exercise of discretionary functions, especially in light of the *Grant* case, which had been decided in 1942, recognizing discretionary function immunity for TVA. See pp. 34-35, *supra*. The exclusion of TVA could have been motivated by any of the myriad procedural and other provisions in the FTCA. See also *Atchley*, 69 F. Supp. at 955 n.4 (stating that "TVA was exempted from the provisions of the [FTCA] at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome.").

2. Petitioners further contend (Pets. Br. 18-19, 35-37) that recognizing immunity for discretionary functions would contravene congressional intent and Congress's "absolute" power to dictate waivers sovereign immunity. That argument is incorrect.

As this Court explained in *People of Porto Rico*, a grant of consent for an agency "to sue and be sued" does not mean that Congress intended an absolute waiver of the government's sovereign immunity. Those words must "be construed with reference to the powers conferred by the provisions to which they relate." 227 U.S. at 275, 277. Indeed, in *People of Porto Rico*, the Court construed the quoted clause not to waive the government's sovereign immunity from suit generally, absent its consent. Moreover, the entire premise of *Burr* and its progeny is that recognizing limitations on such waivers is sometimes appropriate. Judicial construction of statutes in that manner does not contravene congressional authority.

The question here is whether Congress did intend to subject TVA to tort claims for the activities of its employees engaged in discretionary functions by including a general sue-and-be-sued clause in the agency's organic statute. The history of the discretionary-function exception, the TVA Act, and the FTCA all support the conclusion that Congress would have expected TVA to be able to assert an immunity from such claims. When Congress enacted the FTCA—which covered both government-owned corporations and sue-and-be-sued entities—it expected that discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction" even absent an express exception. *Varig Airlines*, 467 U.S. at 810. Although the FTCA excluded TVA from its coverage, Congress

would have had no reason to expect courts to treat TVA differently from other government-owned corporations in that respect. With respect to TVA, like the sue-and-be-sued agencies covered by the FTCA, Congress would have expected the application of immunity for discretionary functions to continue. See *Dalehite*, 346 U.S. at 26 (discretionary function exception in FTCA was a mere "clarifying amendment"); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) ("[T]he bill does not affect the existing liability of [the TVA] to be sued in tort."); cf. *McMellon*, 387 F.3d at 350 (Wilkinson, J., concurring) (subjecting every discretionary act to the prospect of tort liability under the SIAA "would wrongly assign to Congress the desire to debilitate the executive branch").

Congress gave no indication in the TVA Act that it meant to waive the United States' sovereign immunity from suits arising from the performance of discretionary functions, and the Court should not presume that Congress intended to do so. The court of appeals' correctly held that the general waiver of immunity in TVA's organic act does not extend to actions in tort based on the performance of discretionary functions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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